Supreme Court, U. S.
FILED
JAN 29 1979
DAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-482

THE HONORABLE ROBERT K. SMITH, Judge, et al., etc.,

Petitioners,

—v.—

STATE EX REL. DAILY MAIL PUBLISHING CO., etc., et al.,

Respondents.

THE HONORABLE ROBERT K. SMITH, Judge, et al., etc.,

Petitioners,

—v.—

DON MARSH, et al., THE DAILY GAZETTE CO., etc., et al.,

Respondents.

ON A WRIT OF CERTIORARI TO THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF FOR RESPONDENTS

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ON A WRIT OF CERTIORARI TO THE
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BRIEF FOR RESPONDENTS

Opinion Below

The opinion of the West Virginia Supreme Court of Appeals dated June 27, 1978 is set forth at page 1a in the Brief for Respondents Daily Mail Publishing Co., et al., in Opposition to the Issuance of a Writ of Certiorari. It is reported at —— W.Va. ——, 248 S.E.2d 269 (1978).

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1976).

Questions Presented

1. Is West Virginia Code 49-7-3 violative of the First and Fourteenth Amendments to the United States Constitution as a prior restraint on freedom of the press?

2. Is West Virginia Code 49-7-3 violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution by making criminal the truthful publication of information by newspapers, while permitting the identical information to be published by magazines and other periodicals, broadcast on radio and television and otherwise generally and publicly disseminated?

Statutory and Constitutional Provisions Involved

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution, so far as relevant, provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

West Virginia Code 49-7-3 provides:

> "Any evidence given in any cause or proceeding under this chapter, or any order, judgment or finding therein, or any adjudication upon the status of juvenile delinquent heretofore made or rendered, shall not in any civil, criminal or other cause or proceeding whatever in any court, be lawful or proper evidence against such child for any purpose whatsoever except in subsequent cases under this chapter involving the same child; nor shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court; nor shall any such adjudication upon the status of any child by a juvenile court operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction, nor shall any such adjudication operate to disqualify a child in any future civil service examination, appointment, or application."

West Virginia Code 49-7-20 provides:

> "A person who violates an order, rule or regulation made under the authority of this chapter, or who violates a provision of this chapter for which punishment has not been specifically provided, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten nor more than one hundred dollars, or confined in jail not less than five days nor more than six months, or both such fine and imprisonment."

Statement of the Case

On the morning of February 9, 1978, a 15 year-old student, Arthur Smith, was shot and killed by three shots fired by a 14 year-old classmate at Hayes Junior High School in St. Albans, West Virginia. Seven eye-witnesses saw the shooting. The alleged assailant, Stuart Perrock, fled from the school and was apprehended approximately three hours after the shooting following a search involving Sheriff's Deputies, State Police and the use of a State Police helicopter. When arrested, Perrock had in his possession a .22 caliber pistol and a knife. Perrock was returned to the school in the police helicopter, from which he emerged handcuffed and surrounded by police officers. (D.M. Pet. ¶ 5(e), A.6, 13, 20-23; Demurrer, A.33)*

After the shooting occurred, but before Perrock's capture, both the Charleston Daily Mail (an afternoon newspaper) and The Charleston Daily Gazette (a morning newspaper) dispatched journalists to the school in which the shooting had occurred. The Daily Mail sent two reporters and a photographer to the scene; upon arrival, they learned that there were several eye-witnesses to the death; that Perrock was the alleged assailant; and that Perrock's identity was apparently known throughout the school. (D.M. Pet. ¶ 5(a)(b), A.4; Demurrer, A.33). (The identity of Perrock as the alleged assailant was confirmed to the Daily Mail later that afternoon by police officials and an assistant prosecuting attorney of Kanawha County, West Virginia.) (D.M. Pet. ¶ 5(e), A.6, 20-23; Demurrer, A.33). The experience of The Charleston Gazette was similar, their reporter also having been advised of Perrock's name by one of the policemen at the school. (C.G. Pet. ¶ 7, A.25; Answer A.30).

The initial response of the Daily Mail and of The Charleston Gazette differed as to the use each would make of the information learned by both newspapers as to Perrock's name. The editorial decision was made at the Daily Mail not to use Perrock's name in its February 9, 1978 afternoon edition in light of the statutory prohibition against publication without a prior court order (D.M. Pet. ¶ 5(b), A.4; Demurrer, A.33); the contrary editorial decision was reached at The Charleston Gazette which published Perrock's name and picture in an article in its February 10, 1978 morning edition relating to the killing in the school and Perrock's subsequent escape and capture. (A.15-19).

By early morning on February 10, 1978, Perrock's name had not only been published by The Charleston Gazette, but broadcast by, among others, Charleston radio station WCHS (on February 9) and by Charleston radio stations WCAW and WVAF (on February 10). (D.M. Pet. ¶ 5(c) A.5; Demurrer, A.33). The Daily Mail thereupon deter-

* The facts set forth in this paragraph, and all other facts set forth herein, were affirmatively pleaded by Respondents in their petitions filed with the West Virginia Supreme Court of Appeals and were either demurred to or admitted (by not being denied) by Petitioners. Under West Virginia law, a demurrer constitutes an admission of all facts well pleaded. *State ex rel. County Court* v. *State Road Comm'n*, 147 W.Va. 623, 129 S.E.2d 726 (1963). A demurrer (A.33) was filed in response to the petition of the Daily Mail (A.2), thus admitting all the well-pleaded facts contained therein, including the truth of the news article published on February 10, 1978 (A.20-23) which the petition affirmatively alleged was true (D.M. Pet. ¶ 5(e), A.6). An answer (A.30) was filed in response to the petition of The Charleston Gazette (A.24); to the extent the answer puts at issue any allegation in the petition, no reference to such disputed issues are made in this factual statement.

Page references in this section of the brief to the Appendix ("A. .....") filed with this Court refer both to the appropriate pages of the petitions and of the demurrer and answer; the petition of the Daily Mail and its employees is referred to as "D.M. Pet. ¶ ....."; that of The Charleston Gazette and its employees is referred to as "C.G. Pet. ¶ ....."

mined that since Perrock's identity was public knowledge, it too should refer to Perrock by name in its articles with respect to the crimes in the February 10, 1978 issue of the Daily Mail, and did so. (A.20-23). Neither The Charleston Gazette nor the Daily Mail obtained a court order, as required by West Virginia Code 49-7-3, prior to publishing Perrock's name.*

Indictments were returned on March 1, 1978 against both newspapers and various of their employees. The Daily Gazette Company, owner and publisher of The Charleston Gazette, was indicted, as were W.E. Chilton, III, its publisher; Don Marsh, its editor;** and Leslie H. Milam, the journalist who wrote the article referring to Perrock published on February 10, 1978 by the Charleston Gazette. (A.28). The Daily Mail Publishing Company, publisher of the Daily Mail, was indicted; as were Jack Maurice, its editor, and Mary Schnack, the journalist whose article which referred to Perrock was published on February 10, 1978 by

* West Va. Code 49-7-3 applies only when the juvenile court has jurisdiction over the juvenile, and at the time of the killing Perrock could not have been tried as an adult. *See* 1977 W. Va. Laws ch. 65. Seven months earlier, however, the statute would not have applied to this case because 1975 W. Va. Laws ch. 126 required that all juveniles charged with capital offenses be tried in criminal court. One month after the slaying of Arthur Smith, the West Virginia Legislature reenacted and amended W. Va. Code 49-5-10 (Supp. 1978) to provide that under certain circumstances a juvenile may be tried as an adult.

** Petitioners' brief, while omitting virtually all the facts set forth above, prints the entirety of an editorial of Don Marsh explaining the personal—and troubled—nature of the decision of The Charleston Gazette to publish Perrock's name. (Br. pp. 4-5). Petitioners do not, however, suggest the relevance of the editorial to the legal issues raised in this case; to the extent the editorial is relevant at all, it is only because it suggests the difficult nature of the decision of The Charleston Gazette to test, if necessary, the constitutionality of West Virginia Code 49-7-3—and the need for definitive judicial resolution of the constitutional issues raised by this case.

the Daily Mail. Both indictments charged that the defendants "did knowingly and unlawfully publish and cause to be published the name of Stuart Wayne Perrock, a child of the age of fourteen years . . . while a proceeding under the provisions of Chapter 49 of the Code of West Virginia, as amended, was pending against the said Stuart Wayne Perrock . . . in the Circuit Court of Kanawha County, without a written order of said Circuit Court of Kanawha County. . . ."

Both newspapers invoked the original jurisdiction of the West Virginia Supreme Court of Appeals. The Daily Mail sought a Writ of Prohibition against the Judges of the Circuit Court of Kanawha County and the Prosecuting Attorney of that County to prevent further proceedings under the Grand Jury Indictment; The Charleston Gazette sought similar relief from prosecutions. On March 13, 1978, a rule was issued in Prohibition making both cases returnable on May 16, 1978. The two petitions were consolidated because, in the view of the West Virginia Supreme Court of Appeals, "both represent a conceptually indistinguishable permutation of a classic First Amendment . . . issue. . . ." (2a).*

On June 27, 1978, the West Virginia Supreme Court of Appeals held W.Va.Code 49-7-3 unconstitutional as an impermissible prior restraint on freedom of the press. Citing this Court's rulings in cases such as *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976) and *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971), the decision emphasized the "heavy presumption" against the constitutional validity of any prior restraint on expression (4a).

* References to "....a" are to the appropriate pages of the opinion of the West Virginia Supreme Court of Appeals, reprinted as an appendix to the brief of the Daily Mail in opposition to the issuance of a writ of *certiorari*.

Rejecting the argument that "a child's interest in anonymity with regard to his youthful transgressions and the State's interest in assuring him a future free of prejudice" were "sufficiently compelling to permit the statute under review to withstand constitutional scrutiny" (7a), the court held the statute unconstitutional under the First Amendment.

Summary of Argument

At issue in this case is the constitutionality of a West Virginia statute which makes criminal the publication by newspapers of the name of any alleged juvenile offender in the absence of a written order of the court permitting such publication. The West Virginia Supreme Court of Appeals has held the statute to be an unconstitutional prior restraint on freedom of the press.

This brief first demonstrates that the statute, by requiring advance governmental approval before publication, is a prior restraint in the classic mold of licensing laws. Such statutes have long been described by the Court as presumptively unconstitutional. Indeed, prior restraints on publication of what would otherwise be constitutionally protected material has been approved—and only theoretically approved—in but two areas: an extremely narrow one relating to national security referred to in *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931); and a similarly narrow one relating to the Sixth Amendment rights of a defendant considered in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976).

No other exception to the prohibition of prior restraints on such publication has received the *imprimatur* of this Court, and this case, we urge, is hardly one in which still further exceptions should be countenanced. Not only is the

interest sought to be vindicated by confidentiality of the names of juvenile offenders insufficient to overcome the ban on prior restraints (or, in fact, on subsequent punishments), but four independent factors make this a uniquely ill-suited case for any favorable consideration of such a change in law.

The first is that the information sought to be suppressed is truthful; numerous recent opinions of this Court, including but not limited to recent "commercial speech" rulings, are cited demonstrating the special protection afforded just such expression.

Second, given the fact that the information sought to be suppressed is already publicly known, we urge that no efforts can constitutionally be undertaken to limit further dissemination of the information or to punish those who publish it. Numerous recent cases of this Court are relied upon, including the Court's ruling in *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978).

Third, we demonstrate that for a variety of reasons the statute cannot serve its intended purpose. The information sought to be suppressed is, through other methods, widely and routinely disseminated; the coverage of the statute is itself so underinclusive as to assure lack of success in achieving the statutory aim; and (as this case well illustrates) rumors—and personal knowledge—of juvenile offenses, are, in any event, widespread in the communities in which the juvenile offenders reside.

Fourth, we show that alternative means are available to accomplish the statutory purposes. Other statutes (such as West Virginia's legislation barring discrimination against persons with juvenile records) may assist in this effort. Moreover, West Virginia is in a distinct minority of states which seeks to impose criminal penalties on news-

papers for publication of material such is at issue here—a factor given significant weight by this Court in *Landmark.*

Finally, we urge that as a simple matter of equal protection law, the West Virginia statute cannot begin to pass constitutional scrutiny. Far from it being necessary to limit the scope of the statutory ban to newspapers, and only newspapers, the self-imposed limits of the statute assure its lack of success.

ARGUMENT

Introduction: Issues Not Raised by the Case

It is well to begin this brief with a short description of what this case does not involve. First, this is not an "access" case; no claim is asserted that the juvenile court system was itself constitutionally obliged to have furnished to the newspapers the information independently learned by them.

Second, the case does not involve any leaks from the juvenile courts themselves: all the information printed was obtained from public sources, each of which was fully disclosed in the articles.

Third, the case does not present any claim of invasion of privacy, whether premised on "false light," commercial appropriation, or—as in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 489 (1975)—"unwanted publicity about [one's] private affairs." Whatever else may be said of this case, the shooting which took place in Hayes Junior High School was not a "private affair."

This is a prior restraint case. So clear is the constitutional antipathy to such restraints, which "fall on speech

with a brutality and a finality all their own," * that each member of this Court has accepted the "condemnation of prior restraint as presumptively unconstitutional." ** All else aside, that presumption alone, unrebutted as it is here, provides ample grounds for affirming the decision below.

I.

The Proscription in West Virginia Code 49-7-3 Against Publication by Newspapers of the Name of Any Juvenile Against Whom Charges Have Been Filed "Without a Written Order of the Court" Is an Unconstitutional Prior Restraint in Violation of the First Amendment

A. *The Nature of the Prior Restraint*

The articulation by petitioners of the "sole issue" supposedly presented by this case (Br. p. 3) appears to raise as a threshold question not whether the prior restraint imposed by West Virginia Code 49-7-3 is constitutional, but whether it is a prior restraint at all.*** Whatever difficulties this case may be thought to pose, that can hardly be one of them.

The statute in question is, to be sure, not a prior restraint because it subjects newspapers to criminal punishments for what they print; if that were the only vice of the statute, relevant First Amendment analysis could proceed, as in

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* A.M. Bickel, *The Morality of Consent* 61 (1975).

** *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539, 558 (1976) quoting from *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Rights,* 413 U.S. 376, 396 (1973) (Burger, C.J., dissenting).

*** "The sole question to be considered herein is whether West Virginia Code 49-7-3 creates a prior restraint on the freedom of the press and, therefore, is violative of the First Amendment. . . ." (Br. p. 3).

Landmark, as to whether any such statute punishing free expression could possibly pass constitutional muster.

But the West Virginia statute at issue here goes further: it precludes publication of the name of the juvenile, however the name was learned, in the absence of *"a written order of the court"* permitting such publication. Any proscription against publication without advance approval by a governmental official is a prior restraint—one, in fact, in a far more traditional mold than has been considered by this Court in cases ranging in time from *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931) through *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) and *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976). All those cases involve prior restraints imposed by judicial injunctions, a form of restriction which *Near* treated as a prior restraint because of its "operation and effect," 283 U.S. at 708, rather than its conceptual similarity to 17th century English licensing.

The ban on publication without prior governmental approval is at the heart of licensing—and of censorship. *See* 4 Blackstone Comm. 151, 152; *Near*, 283 U.S. at 713-14. In fact, the only conceptual difference between the statutory scheme effected by the West Virginia statute and the historic form of pre-publication licensing is the identity of the governmental official imposing the restraint. As to that, as many cases including *New York Times* and *Nebraska Press Ass'n* themselves demonstrate, there is no more First Amendment tolerance for the imposition of prior restraints by the judiciary than by any other branch of government.

B. *The "Narrow Exceptions" to the Prohibition on Prior Restraints*

The mere categorization of a state statute as embodying a prior restraint does not, of course, in and of itself conclusively demonstrate its unconstitutionality. There is no doubt that there are circumstances in which prior restraints may be constitutional. But the fact that all prior restraints are "not unconstitutional *per se*," *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558 (1975), does not mean that there is to be a continuing and wholly *ad hoc* balancing process as to whether particular prior restraints are or are not to be entered. As this Court made clear in *Southeastern Promotion*, "[i]n order to be held lawful" a prior restraint "first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints. . . ." (420 U.S. at 559)*

Until this Court's ruling in *Nebraska Press Ass'n*, the "narrowly defined exceptions" on publication of constitutionally protected material had been limited to *one* area—that of national security. As summarized by Mr. Justice Brennan in his concurring opinion in *New York Times Co.*:

> "Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation 'is at war,' *Schenck* v. *United States*, 249 U.S. 47, 52 (1919), during which time '[n]o one would question but that a government might prevent actual obstruction to its recruiting

* *As Southeastern Promotion* itself emphasizes, even when prior restraints are otherwise appropriate, the most rigorous procedural safeguards "designed to obviate the dangers of a censorship system" are required. 420 U.S. at 559, quoting from *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965). Among them are clear statutory guidelines, the placing of the burden of proof on the party seeking the restraint and assurance of prompt judicial determination. *E.g.*, *Nebraska Press Ass'n, supra*, 427 U.S. at 539 (Brennan, J., concurring in judgment); *Freedman* v. *Maryland, supra; Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70-71 (1963); *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957). None of those safeguards are provided in the statute at issue.

> service or the publication of the sailing dates of transports or the number and location of troops.' *Near* v. *Minnesota,* 283 U.S. 697, 716 (1931)." (403 U.S. at 726).

In *Nebraska Press Ass'n,* an additional and extremely narrow category in which, in theory, prior restraints on publication could conceivably be imposed was discussed—*e.g.,* circumstances in which a defendant's Sixth Amendment rights would otherwise be lost. But the majority opinion in *Nebraska Press Ass'n* refused to "assign priorities as between First Amendment and Sixth Amendment rights" (427 U.S. at 561) and emphasized that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights" (*id.* at 559). The majority opinion, as well as each concurring opinion, stressed the rarity with which prior restraints, even for the purpose of protecting another constitutional right, could conceivably be entered: the Court's reversal, it was emphasized, was "not simply a result of assessing the adequacy of the showing made in this case" but was "illustrative" of the difficulties parties would have in the future of meeting the "heavy burden" of demonstrating the propriety of prior restraints. (*Id.* at 569)*

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* Since the *Nebraska Press Ass'n* decision, the practice of issuing restrictive orders for the purpose of protecting Sixth Amendment rights appears to have all but totally ended. A few further restrictive orders were entered shortly before or after the ruling in *Nebraska Press Ass'n* and reversed. *See e.g., Times-Picayune Publishing Corp.* v. *Marullo,* 334 So.2d 426 (La. 1976); *State* v. *Allen,* 73 N.J. 132, 373 A.2d 377 (1977); *New York Times Co.* v. *Starkey,* 51 App.Div.2d 60, 380 N.Y.S.2d 239 (2d Dep't 1976). We are aware of no appellate rulings subsequent to *Nebraska Press Ass'n* in which any such prior restraint has been affirmed. *See generally* Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Association* v. *Stuart,* 29 Stan.L.Rev. 497, 498 (1977).

Moreover, since—and, in good part, as a result of—this Court's ruling in *Nebraska Press Ass'n,* the American Bar Association has opposed the issuance of prior restraints on publication relating to all criminal cases. As set forth in Standard 8-3.1 of the Standards Relating to the Administration of Criminal Justice, Fair Trial & Free Press (approved August 9, 1978):

> "No rule of court or judicial order shall be promulgated that prohibits representatives of the news media from broadcasting or publishing any information in their possession relating to a criminal case."

The virtually absolute prohibition on prior restraints on publication except—and thus far only hypothetically—in these one or two areas is deeply rooted in American history. The First Amendment itself "developed directly out of attempts to license the press" and as Professor Emerson has written, "[n]othing in the growth of modern society has, thus far at least, appealed to the country as grounds for altering the considerations which led to the elimination of prior restraint upon the press." Emerson, *The Doctrine of Prior Restraint,* 20 Law & Contemp. Prob. 648, 662 (1955).

In a number of opinions prior and subsequent to *Near,* the ban on prior restraints on publication was expressed as an absolute. *See, e.g., Patterson* v. *Colorado ex rel. Attorney General,* 205 U.S. 454, 462 (1907); *Grosjean* v. *American Press Co.,* 297 U.S. 233, 249 (1936); *Kunz* v. *New York,* 340 U.S. 290, 307 (1951) (Jackson, J., dissenting). *In dictum* in *Near,* a narrow exception in certain national security cases was adverted to; in *New York Times Co.,* the exception was discussed; and in *Nebraska Press Ass'n,* the possibility of prior restraints to assure a defendant's Sixth Amendment rights was considered. In *no* case involving publication of what would otherwise be protected expression under the First Amendment—let alone a case involving what this Court referred to in *Nebraska Press Ass'n* as "news and commentary on current events," 427 U.S. at 559—has any other possible exception received, in any fashion, the *imprimatur* of this Court.

C. *The Confidentiality of the Names of Alleged Juvenile Offenders*

This is hardly a case which warrants any change in pre-existing law. Petitioners themselves have barely even attempted to defend, let alone to set forth the purposes of, the West Virginia statute.* Apart from the observation that the notoriety which results from publication of the juvenile offender's name would "scar rather than scare," the only justification offered by petitioners is that publication "handicaps [the offender's] prospects for future adjustment in society and acceptance by the public." (Br. p. 6). The *amici curiae* supporting reversal argue, as well, that publication of the name of the juvenile offender constitutes a "traumatic stigma, counter productive to any effort at rehabilitation in the majority of instances." (Br. p. 4).

As the facts of this case well illustrate, these appear, at best, to be dubious generalizations; surely Perrock's psyche is more scarred from killing his classmate, fleeing, being captured and the like than by the fact that his name appeared in the newspapers for a day or two. Indeed, there is absolutely no evidence in this record—or, so far as we can tell, in the literature—to the effect that any juvenile has ever committed a crime because his name was referred to in a newspaper.**

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* No legislative history of the statute of any sort appears to exist and none has, in any event, been offered by petitioners.

** There is, to be sure, scholarly debate as to the effect of "labelling" a juvenile as a criminal. *See, e.g.*, the analyses contained in *The Labelling of Deviance: Evaluating a Perspective* (W. Gove ed. 1975) and Foster, Dinitz & Reckless, *Perceptions of Stigma Following Public Intervention for Delinquent Behavior*, 20 Social Problems 202 (1972). However, experts on labelling theory do not focus on newspaper reports as possible examples of labelling, but on the attitudes of those with whom the juvenile must deal. It is the process of the delinquency adjudication itself, the

In any event, and whatever the merits of the West Virginia policy of not revealing the names of juveniles accused of offenses within the juvenile court system, the effort to provide confidentiality to alleged juvenile offenders hardly rises to a level even arguably equivalent to those rare possible exceptions adverted to in *Near* and *Nebraska Press Ass'n.*

In *Davis* v. *Alaska,* 415 U.S. 308 (1974), this Court considered the question of how to balance the right of a juvenile to confidentiality against the Sixth Amendment confrontation right of a defendant. The Court's holding and its language are significant:

> "The claim is made that the State has an important interest in protecting the anonymity of juvenile offenders and that this interest outweighs any competing interest this petitioner might have in cross-examining Green about his being on probation. The State argues that exposure of a juvenile's record of delinquency would likely cause impairment of rehabilitative goals of the juvenile correctional procedures. This exposure, it is argued, might encourage the juvenile offender to commit further acts of delinquency, or cause the juvenile offender to lose employment opportunities or otherwise suffer unnecessarily for his youthful transgression.
>
> "We do not and need not challenge the State's interest as a matter of its own policy in the administration

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denigrating effects of institutionalization, with the resultant feeling of guilt, and the perceptions of those who count to him—adult authority figures, his family and peers—to which the juvenile is said to react. *See* C. Bartollas, S. Miller, & S. Dinitz, *Juvenile Victimization* 85-87 (1976); D. Matza, *Becoming Deviant* 180-81 (1969); E. Schur, *Labeling Deviant Behavior* 86-91 (1971); Snyder, *The Impact of the Juvenile Court Hearing on the Child,* 17 Crime & Delinq. 180 (1971); Report of the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 80 (1967).

of criminal justice to seek to preserve the anonymity of a juvenile offender. Cf. *In re Gault,* 387 U.S. 1, 25 (1967). Here, however, petitioner sought to introduce evidence of Green's probation for the purpose of suggesting that Green was biased and, therefore, that his testimony was either not to be believed in his identification of petitioner or at least very carefully considered in that light. Serious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry. In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness." (415 U.S. at 319).

Two elements in *Davis* are significant. First, the holding of the Court that Sixth Amendment rights must be vindicated over countervailing claims of juvenile confidentiality is persuasive analogous precedent for a similar ruling vindicating First Amendment rights over the same challenge. If, as *Nebraska Press Ass'n* holds, no "priority" is to be afforded between First and Sixth Amendment rights, there can be little basis for vindicating Sixth Amendment rights over those of the juvenile offender and refusing to do so for First Amendment rights.*

* The decision in *Davis* did involve—and was, in part, premised upon—waiver by the state in putting the juvenile offender on the witness stand and then objecting to cross-examination based upon his criminal record. (415 U.S. at 320). From the point of view of the juvenile, however, there was no waiver at all: as a result of being subpoenaed to testify, he lost the confidential treatment afforded him by statute.

Second, the language of the Court that the juvenile might suffer "temporary embarrassment" if his juvenile record were disclosed is instructive: surely, far stronger state or personal interests are required to overcome even less vigilantly enforced First Amendment precepts than the ban on prior restraints.

What is thus arrayed in this case against the First Amendment interests at issue is one of a large number of arguable—and arguably significant—societal interests.* One need not quarrel with the contention that West Virginia may attempt to keep secret the name of its alleged juvenile offenders; as in *Landmark,* this case does not pose any question of press or public access to "secret" information. What is involved is the right of the press to decide, without prior judicial approval, what it may print. That right has been vindicated ever more clearly in recent years—in, for example, *Landmark* itself;** in *Houchins* v. *KQED,*

* There are, of course, many other interests of substance which routinely fall before the virtual prohibition on prior restraints: Libel is one example. Surely a party who can allege and prove that a libel is about to be printed about him is not irrational in asserting that society is harsh in relegating him to damages and denying him an injunction—regardless of the proof he submits. Yet, since what appears to be the first prior restraint case in American history, *Brandreth* v. *Lance,* 8 Paige Ch. 24 (N.Y. 1839), the courts have consistently held that no libel may be enjoined. Again, in *Near* itself, the harm which could have been caused by permitting the publication of the racist material there involved, 283 U.S. at 724-26 (Butler, J., dissenting), was evident; the social utility of publication was minimal. Nonetheless, the Court concluded that so clear was the prohibition on prior restraints that the publication by the press could not be enjoined.

** *Landmark* was itself not a prior restraint case, but one involving subsequent punishment for dissemination of proscribed information. As Justice Brennan has observed "[p]rior restraints are particularly anathematic to the First Amendment, and any immunity from punishment subsequent to publication of given material applies *a fortiori* to immunity from suppression of that material before publication." *Nebraska Press Ass'n,* 427 U.S. at 598 (Brennan, J., concurring in judgment).

Inc., 98 S.Ct. 2588, 2594 (1978) ("the government cannot restrain communication of whatever information the media acquires—and which they elect to reveal"); and in the Court's ruling in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974); *id.* at 259 (White, J., concurring). *See also* Stewart, *"Or of the Press,"* 26 Hastings L.J. 631 (1975); A. M. Bickel, *The Morality of Consent* 80 (1975). To deviate from that deeply rooted policy, particularly in the context of a statute imposing prior restraints, would be particularly unjustifiable.*

1. The Information Sought to Be Suppressed Is Truthful

The prior restraint and criminal proscriptions of the West Virginia statute are directed towards a single constitutionally dubious end—the suppression of truthful expression. There is no issue in this case that Perrock did kill his classmate in front of many witnesses; indeed, it is only because Perrock was, in fact, charged before the juve-

* In light of the clarity with which this Court has held that "the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content . . . ," *Tornillo*, 418 U.S. at 259 (White, J., concurring), we have not canvassed all the reasons that particular journalists might, on some occasions, determine to print the name of an alleged juvenile offender. Surely, however, if the victim were a significant public official, censorship of the name of his assailant would be difficult to defend. The same is true if the juvenile offender had repeatedly committed such crimes—but no meaningful punitive action had been taken against him. The facts of this case provide another instructive example: the newspaper articles described, *inter alia*, that Smith had himself been previously accused of arson within the school; that Perrock was to be a witness in the case; and that there had been a number of fist fights between the boys at school (A. 17, 22). Such information is not only "newsworthy," it helps to supply to all the answer to the critical question of *why* the killing occurred. And it is all but impossible to convey rationally without describing—and naming—both parties to the previous altercations.

nile court that criminal proceedings could have been commenced against the Daily Mail and The Charleston Gazette.

Yet, it is an accepted principle of our jurisprudence that:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill* v. *Alabama*, 310 U.S. 88, 101-02 (1940) (footnote omitted).

So basic is the principle that truthful speech must be protected that, in a series of recent decisions, it has been applied to even the most mundane of commercial transactions. A state has thus been held to be constitutionally forbidden from complete "supress[ion] [of] the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976); *see also Bates* v. *State Bar*, 433 U.S. 350 (1977); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977).

Yet that is precisely what West Virginia's statute is all about: fearful of the effects of the "truthful information" at issue here, West Virginia has attempted, however ineffectually, to suppress it. In a nation in which violent juvenile crime has increased at dizzying rates,* the proposi-

* Between 1960 and 1975, arrests of persons 18 and under increased by the following percentages in the following categories: murder and nonnegligent manslaughter (+211.1%); manslaughter by negligence (+50%); forcible rape (+102%); robbery (+375%); aggravated assault (+240.6%); burglary (+137.5%); larceny-theft (+165.7%); motor vehicle theft (+24.1%). Criminal Justice Research Center, *Sourcebook of Criminal Justice Statistics—1977* 485 (1978). In 1977, the percentages of arrests of

tion that the publication of truthful information about the perpetrators of those crimes may subject newspapers to traditionally unconstitutional penalties is, *ab initio,* a totally unacceptable one.

2. The Information Sought to Be Suppressed Is Already Public

In a series of cases decided by this Court in recent years, it has been made clear that while government may try to keep secret what it can, information which is already public may not be later hidden by the state, *nunc pro tunc,* in an effort to act as if the public disclosure had never occurred. That is at the essence of this Court's decision in cases such as *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975) and *Oklahoma Publishing Co.* v. *District Court,* 430 U.S. 308 (1977). In *Cox,* notwithstanding the strong social interests in personal privacy, the Court held that once the name of a rape victim was placed in public court records, no criminal or civil sanctions could be imposed on those who published or broadcast the name.* In *Oklahoma,* the Court held that once journalists had been permitted to

persons 18 and under as compared to all arrests for the offenses listed above were as follows: murder and nonnegligent manslaughter (9.7%); manslaughter by negligence (11.1%); forcible rape (16.5%); robbery (32%); aggravated assault (16.3%); burglary (51.5%); larceny-theft (42.9%); motor vehicle theft (53%). U.S. Dep't of Justice, Federal Bureau of Investigation, *Uniform Crime Reports for the United States 1977* 182 (1978).

* In *Cox,* the Court cited the Restatement (Second) of Torts § 652D, comment c (Tent. Draft No. 13, 1967) (now in final form as Restatement (Second) of Torts § 652D, comment b (1977)), which states that "[t]here is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public." 420 U.S. at 494. *Cox* itself reserved the question of whether sanctions may ever be imposed for the publication of truthful, but assertedly "private," information, whether obtained from public records or by a newspaper's own investigation. 420 U.S. at 491, 497 n.27.

attend a juvenile hearing, they could not later be enjoined from publishing what they learned.

In both cases, the Court rejected the notion that information which the legislature had sought to keep confidential but had been lawfully learned, could later, once again, be made confidential—or that those who published or broadcast the information could have criminal sanctions imposed upon them. Still more recently, in *Landmark,* notwithstanding strong public policy interests in favor of keeping confidential meetings of Virginia's Judicial Inquiry Commission, the Court held that once the previously secret information—*e.g.,* the name of the juvenile court judge under investigation—was publicly known, neither a member of the public nor the press could be punished for expressing it.

A similar situation is presented by this case. Information was lawfully obtained by journalists by interviewing, *inter alia,* eye-witnesses to a crime, police officials and an assistant district attorney. Perrock's identity was disclosed by police officials to the press—and, presumably, to all others who were interested and had not already spoken to one or more of the students at Hayes Junior High School. To contend, under these circumstances, that the newspapers which learned the information may not print it is Orwellian in its implications;* when all know what happened, but

* The Court may recall the scene in Orwell's *1984* in which the protagonist of the book recalls having found a fragment of an old newspaper clipping which, on its face, demonstrated the falsity of confessions made by political prisoners. He had destroyed the clipping, "a fragment of the abolished past, like a fossil bone which turns up in the wrong stratum and destroys a geological theory," but later considers the implications of a society in which "[t]he past not only changed, but changed continually." G. Orwell, *1984* 62 (Signet ed.). Not the least offensive characteristic of the West Virginia statute is its purposeful effort to destroy history, an effort (unlike Orwell's nightmare world) un-

newspapers are barred from printing it, far more than the credibility (or even the freedom) of the press will dissolve: so, inevitably, will the credibility of our society as a whole. First Amendment law has never before permitted such an eventuality.

3. The Prior Restraint Cannot Serve Its Intended Purpose

As *Nebraska Press Ass'n* itself makes clear, prior restraints may not issue even to protect Sixth Amendment rights unless, *inter alia,* they are "workable," and "would serve [their] intended purpose." (427 U.S. at 565, 569). In this area, they are inherently unworkable for a number of reasons. As a practical matter, such efforts at secrecy simply cannot work in light of realities of life having nothing to do with whether or not newspapers face criminal penalties for publishing the names of alleged juvenile offenders. As this Court observed in its seminal ruling in *In re Gault,* 387 U.S. 1 (1967):

> "[I]t is frequently said that juveniles are protected by the process from disclosure of their deviational behavior. As the Supreme Court of Arizona phrased it in the present case, the summary procedures of Juvenile Courts are sometimes defended by a statement that it is the law's policy 'to hide youthful errors from the full gaze of the public and bury them in the graveyard

dertaken in undoubted good faith and for arguably beneficent reasons. As Justice Brandeis once observed:

> "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

Olmstead v. *United States,* 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (footnote omitted).

> of the forgotten past.' This claim of secrecy, however, is more rhetoric than reality. Disclosure of court records is discretionary with the judge in most jurisdictions. Statutory resolutions almost invariably apply only to the court records, and even as to those the evidence is that many courts routinely furnish information to the FBI and the military, and on request to government agencies and even to private employers. Of more importance are police records. In most States the police keep a complete file of juvenile 'police contacts' and have complete discretion as to disclosure of juvenile records. Police departments receive requests for information from the FBI and other law-enforcement agencies, the Armed Forces, and social service agencies, and most of them generally comply. Private employers word their application forms to produce information concerning juvenile arrests and court proceedings, and in some jurisdictions information concerning juvenile police contacts is furnished private employers as well as government agencies." (387 U.S. at 24-25) (footnotes omitted).

Accord, McKeiver v. *Pennsylvania,* 403 U.S. 528, 567-68 (1971) (Douglas, J., dissenting).*

Nor is the West Virginia statute "workable" in the sense of possibly accomplishing its desired ends in light of its spotty and far from inclusive coverage. By its terms—and by the interpretation given the statute by petitioners below—the statute applies only to newspapers, excluding from its coverage radio, television, magazines and the wide range of other publications and speech. En-

* *See also* Spalty, *Juvenile Court Record-Keeping,* 4 Colum. Hum. Rights L. Rev. 461 (1972); Edwards & Sagatun, *A Study of Juvenile Record Sealing Practices in California,* 4 Pepperdine L. Rev. 543, 549-51 (1977).

tirely apart from the question of whether such an idiosyncratic selection process by the state as to whose expression it chooses to suppress can survive any equal protection analysis,* the inescapable fact remains that such a statute simply cannot work—and thus cannot possibly pass muster as an exception to the prohibition on prior restraints.**

The undisputed facts in this case are illustrative: at least three radio stations broadcast Perrock's name. Presumably, it was mentioned as well on television. Under such circumstances it can hardly even be urged that the restraint imposed by the statute could accomplish any conceivable purpose.***

There is still a third, and wholly independent, reason that the statute could not possibly fulfill its purpose—one almost identical with facts adverted to in *Nebraska Press Ass'n*. The killing in this case took place in St. Albans, West Virginia, a town of 14,356.† The killing was in a

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* *See* Section II, *infra*.

** The statute is necessarily underinclusive and hence unworkable for the additional reason that news reports published outside of West Virginia are not within the reach of the prohibition, *cf. Nebraska Press Ass'n*, 427 U.S. at 565-66, 566 n.10.

*** In their brief filed with the West Virginia Supreme Court of Appeals, petitioners argued that West Virginia could not lawfully punish radio and television stations because of pre-emption by the Federal Communications Commission. (Br. pp. 13-14). Whatever the accuracy of this proposition as a matter of law, it does not begin to join issue with the proposition, stated in text, that prior restraints may not issue when they will not work. Moreover, the reluctance of West Virginia even to attempt to limit dissemination of the names of alleged juvenile offenders in magazines, from soap boxes and elsewhere hardly suggests that the social problems allegedly caused by such publications are even serious, let alone grave.

† U.S. Dep't of Commerce, *Census Report—1970*.

junior high school, the only junior high school in St. Albans; it occurred in front of seven eye witnesses. (A. 21) As reported by the Daily Mail:

> "The shooting momentarily sent panic through the neighborhood, and parents who heard about the incident rushed to the school to take their children home. Some parents feared that children who witnessed the shooting would be emotionally upset. Some children were in tears when they met their parents." (A. 13)

Under these circumstances, the language of *Nebraska Press Ass'n* is precisely on point:

> "Finally, we note that the events disclosed by the record took place in a community of 850 people. It is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it." (427 U.S. at 567).

4. Alternative Means Are Available to Accomplish the Purposes of the Statute

Another element considered in the *Nebraska Press Ass'n* ruling was whether alternative means were available to accomplish the desired ends of the statute. In *Nebraska Press Ass'n* itself the court concluded that "[w]e cannot say on this record that alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make a prior restraint unnecessary." (427 U.S. at 569). In this case,

there is absolutely *no* record from which the conclusion can be reached that the statutory scheme embodying both prior restraints and criminal punishments is, in any degree, "necessary" to protect the confidentiality of the identity of accused juvenile offenders. Here, as in *Landmark*, petitioners rely upon nothing more than "assertion and conjecture," 435 U.S. at 841, to support the proposition that criminal sanctions (let alone prior restraints) are required in order to vindicate the statutory purpose.

Protection of a convicted delinquent from the stigmatizing effects of his offense can be accomplished by other, far less constitutionally objectionable means than the imposition of prior restraints (or criminal punishments) upon the press. For example, legislation can and has been enacted prohibiting all discrimination on account of a juvenile record. Such statutes obviate any need for a job applicant with a juvenile record to engage in troublesome lying about his past—with the attendant risk of future problems if his falsehood is discovered—and also protect not just those whose names have been published, but all applicants with juvenile records of which employers may be aware.* West Virginia itself has enacted legislation specifically prohibiting discrimination against persons with juvenile records "in access to, terms of, or conditions of employment, housing, education, credit, contractual rights or otherwise" W.Va. Code 49-5-17(e) (Supp. 1978). There is no basis for concluding that such a statute is not a sufficient guarantee of equal employment opportunities to persons with juvenile records.

* A national task force recently recommended adoption of such a statute, National Advisory Committee on Criminal Justice Standards and Goals, *Report of the Task Force on Juvenile Justice and Delinquency Prevention*, Standard 3.27 (1976) (hereafter "Task Force Report").

There are various other means available to the state in furthering its goal of rehabilitating youthful offenders. Treatment programs presumably will offset the criminogenic effects of the "label" with which the offender must contend, whether or not a newspaper has published his name. Job placement services, training programs and community public relations can offset employer prejudice.*

Nor is there any ground for concluding on the basis of the experience of other states that the provisions of the West Virginia statute are necessary to protect the identity of alleged juvenile offenders. As in *Landmark*, it may be said in this case that "the imposition of criminal sanctions" on newspapers for the breach of confidentiality "is not a common characteristic of the state plans. . . ." (435 U.S. at 836). In *Landmark*, that was the Court's conclusion in a context in which over 40 states had judicial commissions which took evidence in secret, but in which only 2 punished the press or public criminally for breaching that confidentiality.

The state-by-state lineup is similar in the instant case. It appears that all 50 states** and the federal govern-

* Social workers and counselors whose job it is to place youthful offenders in employment programs report that they are able to overcome employer resistance to a substantial degree. *See* R. Hardy & J. Cull, *Psychological and Vocational Rehabilitation of the Youthful Delinquent* 167 (1974). *See also* Task Force Report, *supra* at 137.

** Ala. Code tit. 12, §§ 12-15-65(a), 12-15-100 *et seq.* (1977); Alaska Stat. §§ 09.25.120(2), 47.10.070, 47.10.090 (1973, 1975, & Supp. 1977); Alaska Children's R. 12(d)(2), 26; Ariz. Juv. Ct. R. 19; Ark. Stat. Ann. §§ 45-434, 45-442, 45-443 (1977); Cal. Welf. & Inst. Code §§ 676, 827 (West 1972 & Supp. 1978); Cal. Ct. R. 1311; Colo. Rev. Stat. §§ 19-1-107, 19-1-111 (1974); Colo. Juv. Proc. R. 19(b); Conn. Gen. Stat. Ann. §§ 1-19(b)(3)(D), 54-76*l* (West Supp. 1978); 1978 Conn. Legis. Serv., P.A. 78-280, §§ 92, 95 (to be codified at Conn. Gen. Stat. Ann. §§ 51-305, 51-335); *id.*, P.A. 78-318, § 27 (to be codified at Conn. Gen. Stat. Ann. §51-305);

(footnote continued from previous page)

id., P.A. 78-379, § 11 (to be codified at Conn. Gen. Stat. Ann. § 51-319); Conn. Ct. R. 1134; Del. Code Ann. tit. 10, § 972 (1975); Del. Fam. Ct. R. 200, 350, 370; D.C. Code §§ 16-2316(e), 16-2331 *et seq.* (Supp. V 1978); D.C. Juv. Ct. R. 53, 55; Fla. Stat. §§ 39.031, 39.09(1)(c),(4), 39.12 (West Supp. 1978); Ga. Code Ann. §§ 24A-1801(c), 24A-3501 *et seq.* (1976 & Supp. 1978); Haw. Rev. Stat. §§ 571-41, 571-84 (Supp. 1975); Idaho Code §§ 16-1811 (7), 16-1813, 16-1816 (Supp. 1978); Idaho Dist. Ct. R. 21(b), 22(b); Ill. Ann. Stat. ch. 37, §§ 701-20(6), 702-8(3), 702-10, 702-10.1 (Smith-Hurd 1972 & Supp. 1978); Ind. Code Ann. §§ 31-5-2-2, 31-5-7-15 (Burns 1973 & Supp. 1978) (repealed effective Oct. 1, 1979); *id.* §§ 31-6-7-10, 31-6-8-1 (Burns Supp. 1978) (effective Oct. 1, 1979); Iowa Code Ann. §§ 232.27, 232.54 *et seq.* (West 1969 & Supp. 1978) (repealed effective July 1, 1979); 1978 Iowa Legis. Serv., H.F. 248, §§ 19, 77 *et seq.* (effective July 1, 1979); Kan. Stat. §§ 38-822, 45-201 (Supp. 1977); 1978 Kan. Sess. Laws ch. 158, §§ 2, 3 (to be codified in part at Kan. Stat. § 38-805); Ky. Rev. Stat. §§ 208.060(1), 208.340 (1977); La. Rev. Stat. Ann. §§13:1586, 13:1586.1 (West 1968 & Supp. 1978); 1978 La. Sess. Law Serv., Act 172, art. 69 (effective Jan. 1, 1979); Me. Rev. Stat. tit. 15, §§ 3307, 3308 (Supp. 1978); Md. Cts. & Jud. Proc. Code Ann. §§ 3-812(e), 3-828 (Supp. 1978); Mass. Gen. Laws Ann. ch. 119, §§ 60A, 65 (West 1969 & Supp. 1978); Mich. Comp. Laws Ann. §§ 712A.17, 712A.28 (West 1968); Minn. Stat. Ann. §§ 260.155(1), 260.161 (West 1971); Minn. Juv. Ct. R. 11-2, 11-3; Miss. Code Ann. §§ 43-21-19, 43-23-17 (1972); 1977 Miss. Laws ch. 474, § 7 (amending Miss. Code Ann. § 43-23-41); 1975 Miss. Laws ch. 494, § 3 (amending Miss. Code Ann. § 43-21-17); Mo. Ann. Stat. §§ 211.171(5), 211.321 (Vernon 1962 & Supp. 1979); Mo. Juv. Ct. R. 117.02, 122.02, 122.03; Mont. Rev. Codes Ann. §§ 10-1220(5), 10-1230, 10-1231, 10-1241 (Supp. 1977); Neb. Rev. Stat. §§ 43-206.04(2), 43-243 (1974 & Supp. 1978); Nev. Rev. Stat. §§ 62.193 (1), 62.200, 62.270 (1977); N.H. Rev. Stat. Ann. §§ 169:20, 169:22, 169:27, 169:28 (1978); 1978 N.H. Laws ch. 37 (amending N.H. Rev. Stat. Ann. § 169:14); N.J. Stat. Ann. § 2A:4-65 (West Supp. 1978); N.J. Ct. R. 1:38, 5:9-1(a), 5:10-6(b), 5:10-7; N.M. Stat. Ann. § 13-14-28 (Supp. 1977); 1977 N.M. Laws ch. 278, § 11 (amending N.M. Stat. Ann. § 13-14-42); N.Y. Fam. Ct. Act §§ 741 (b), 750(1), 784 (McKinney 1975 & Supp. 1978); N.Y. Crim. Proc. Law §§ 720.15, 720.35, 725.15, 725.20 (McKinney 1971 & Supp. 1978); N.C. Gen. Stat. §§ 7A-285, 7A-287 (1969 & Supp. 1977); N.D. Cent. Code §§ 27-20-24, 27-20-51 *et seq.* (1974 & Supp. 1977); Ohio Rev. Code Ann. §§ 2151.14, 2151.35 (Page 1976); Ohio Juv. Proc. R. 37(B); Okla. Stat. Ann. tit. 10, §§ 1111, 1125, 1127(a), 1506(b) (West Supp. 1978); Or. Rev. Stat. §§ 419.498 (1), 419.567, 419.584 (1977); Pa. Cons. Stat. Ann. tit. 42, §§ 6307,

(footnote continued on next page)

ment* provide, in some fashion or other, for confidentiality of juvenile delinquency proceedings; of the states, only 6

6308, 6336(d) (Purdon 1978 Pamphlet, pt. 1); R.I. Gen. Laws §§ 8-10-21, 14-1-30, 14-1-64 (1970 & Supp. 1977); S.C. Code §§ 14-21-30, 14-21-590(d), 14-21-610, 14-21-810(a)(14) (1977); S.D. Codified Laws §§ 26-8-32, 26-8-33, 26-8-34 (1976); Tenn. Code Ann. §§ 37-224(d), 37-251 *et seq.* (1977); Tex. Fam. Code Ann. tit. 3, §§ 51.14, 54.08 (Vernon 1975); Utah Code Ann. §§ 78-3a-33, 78-3a-55 (1977); Vt. Stat. Ann. tit. 33, §§ 651, 663 (Supp. 1978); Va. Code §§ 16.1-300 *et seq.* (Supp. 1978); Wash. Rev. Code Ann. §§ 13.04.270, 13.04.272, 13.34.110 (Supp. 1978); W. Va. Code §§ 49-7-1, 49-7-3 (1976 & Supp. 1978); 1977 Wis. Laws ch. 354, §§ 47, 53 (to be codified at Wis. Stat. §§ 48.396, 48.31); Wyo. Stat. §§ 14-115.25, 14-115.40 (Supp. 1975); 1976 Wyo. Laws ch. 3, § 1 (amending Wyo. Stat. § 14-115.41).

* Although the *amici* brief submitted on behalf of petitioners urges that the federal statute, 18 U.S.C. § 5038(d)(2) (1976) is similar to West Virginia's (Br. 10-11), the federal statute provides for no criminal penalty for publication, and the import of its language—"neither the name nor picture of any juvenile shall be made public by any medium of public information"—is far from clear. The provision is part of a series clearly designed to safeguard the confidentiality of records by regulating court personnel. The statutory language is not discussed at all in the legislative history. The language from the Senate Report quoted in the *amici* brief merely reflects the inescapable fact that, as this Court has repeatedly recognized, delinquency sanctions and institutional processes themselves have stigmatizing effects. S.Rep. No. 93-1011, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 5283, 5321-22; *Breed* v. *Jones*, 421 U.S. 519, 529-31 (1975); *In re Gault*, 387 U.S. 1, 23-25 (1967).

The language in 18 U.S.C. § 5038(d)(2) relating to "any medium of public information" is identical with that proposed in § 33 of the Standard Family Court Act, put forth by the National Council on Crime and Delinquency in 1959. Some history of the Standard Act indicates that it may have been intended to apply to the press; specifically, the comment to § 33 of the Act states that the National Council of Juvenile Court Judges "would prefer" that the entire sentence relating to any "medium of public information" be deleted and that the press voluntarily refrain from publishing the names of juvenile offenders. However, as in the case of 18 U.S.C. § 5038(d)(2), no provision for criminal penalties for the press is proposed in the Standard Family Court Act. And, as is always the case, two unconstitutional statutes are no more constitutionally tolerable than one.

(including West Virginia) prohibit publication by non-parties to the proceedings of the identity of juveniles and set forth criminal penalties for the breach thereof.*

This position of the great majority of the states has been supported by the National Council of Juvenile Court Judges, which has concluded that "there should be no statutory prohibition circumscribing the news media in any way," ** and that reliance should be placed instead on the ability of the press and the juvenile courts amicably to resolve any differences in approach. As summarized by one juvenile court judge:

> "So, it seems that the official organ for juvenile judges and the majority of the Legislatures feel that the press, or all modern mass media for that matter, should be permitted to use discretion with respect to the publication of names. Many other sincere, reputable authorities and some State Legislatures, as noted above, feel that there must be authority in the law and the court to prevent abuses of that right.
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> • • •
>
> "My personal opinion is that it is better for all concerned to permit mass media to use their discretion with respect to the publication of names. For the court to act as a super-censor in metropolitan areas seems impractical, cumbersome and burdensome; particularly, in view of the deadlines and datelines involved in the communications field. I believe that mass media generally should be commended for their cooperation in withholding from publication the names and other identifying data relating to juveniles. An understanding knowledge, based on full faith and disclosure, will further this acceptance of the practice of voluntary cooperation." (Footnote omitted.)*

The most recent articulation of proposed standards relating to juvenile records and information systems has, as well, advocated methods of protecting confidentiality of juvenile records without any direct restraints on publication. The IJA-ABA Juvenile Justice Standards Project chaired by Judge Irving R. Kaufman, after an extended study, eschewed the approach of the 6-state minority, recommending instead limitations on access to case files to specified individuals.**

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* The five states' statutes in addition to that of West Virginia are as follows: Colo. Rev. Stat. § 19-1-107(6) (1974); Ga. Code Ann. § 24A-3503(g)(1) (1976); N.H. Rev. Stat. Ann. §§ 169:27, 169:28 (1978); S.C. Code § 14-21-30 (1977); S.D. Codified Laws § 26-8-34 (1976). All five states permit publication only upon the issuance of a prior court order.

Ark. Stat. Ann. § 45-443 (1977) prohibits publication by the media but does not provide for any penalty. Five states and the District of Columbia prohibit use of information derived directly or indirectly from court records or information acquired in the course of official duties, but do not prohibit publication of information derived from other sources. Ala. Code tit. 12, §§ 12-15-100(d), 12-15-101(c) (1977); D.C. Code § 16-2336 (Supp. V 1978); N.J. Stat. Ann. § 2A:4-65(d) (West Supp. 1978); N.M. Stat. Ann. § 13-14-42(D) (amended by 1977 N.M. Laws ch. 278, § 11); Ohio Juv. Proc. R. 37(B); Va. Code § 16.1-309 (Supp. 1978). Three states expressly permit or purport to require publication of the identity of a juvenile when a serious crime has been committed (Delaware, New Jersey, Pennsylvania) and four states (Alaska, Georgia, Mississippi, Nevada) do so if the juvenile has a prior record.

** Conway, *Publicizing the Juvenile Court: A Public Responsibility*, 16 Juv. Ct. Judges J. 21 (1965).

* Riederer, *Secrecy or Privacy? Communication Problems in the Juvenile Court Field*, 17 J. Mo. Bar Ass'n 66, 70 (1961).

** The Project was jointly sponsored by the Institute for Judicial Administration and the American Bar Association, *see* IJA-ABA Juvenile Justice Standards Project, *Standards Relating to Juvenile Records and Information Systems* 117 (Tent. Draft 1977) ("Standard 15.2 allocates the responsibility to juvenile courts to limit access to their own records, thereby avoiding the issue of

Whatever else may be said of the dispute between those who favor and disfavor direct limitations on the press' ability to print names of alleged juvenile offenders, one fact is clear: not only is West Virginia one of a small minority of states in its statutory approach, but there is absolutely no basis for concluding—on this record or otherwise—that methods short of the prior restraint-criminal sanction approach of West Virginia are not a fully adequate substitute for the statute at issue here. Under such circumstances the statute cannot begin to withstand constitutional scrutiny.

II.

West Virginia Code 49-7-3 Violates the Equal Protection Clause of the Fourteenth Amendment in Prohibiting Only Newspapers From Identifying Juvenile Offenders

Petitioners have previously conceded that the West Virginia statute prohibits newspapers, and newspapers only, from identifying juvenile offenders.* Magazines may be printed freely; leaflets may be distributed freely; witnesses, parents, teachers, the PTA, local ministers, and all other individuals and groups may identify juvenile offenders if they learn their names. And—as occurred in this case—radio and television broadcasters remain free to report what they learn.

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exercising direct control over the contents of a publication. . . .") Other standard-setting groups have not recommended imposing restraints on the press, *see* U.S. Dep't of Health, Education and Welfare, *Legislative Guide for Drafting Family and Juvenile Court Acts* § 46 (1969); Uniform Juvenile Court Act (1968); Task Force Report, *supra*, Standard 5.13 (1976).

* Br. in Opp. to Writ of Prohibition, pp. 13-15.

All else aside, there is no way such a statute can meet the requirements of the equal protection clause. It hardly needs extensive citation to demonstrate that when parties exercise a constitutional right, "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969) (emphasis in original). *Cf. Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 312 (1976); *Eisenstadt* v. *Baird*, 405 U.S. 438, 447 n.7 (1972); *Williams* v. *Rhodes*, 393 U.S. 23, 31 (1968).

In this case, far from any disparate treatment being necessary to accomplish the ends of the statute, that treatment itself frustrates the statutory goal. Surely, there is no difference between the supposed effect, in terms of the state's alleged purpose of sealing off a juvenile offender's identity, between a magazine or radio and television broadcasts and newspaper reports. Nor is there likely to be any difference in effect between open discussions of a crime by individuals and groups in the offender's community and newspaper reports. If anything, the offender may well be affected more by the opinions and attitudes of those people in his community than by the larger community of people who neither know him nor are interested in him.

Petitioners have previously urged that West Virginia cannot, consistent with federal regulation of radio and television, regulate the content of the broadcast media. Whatever the accuracy of this allegation, it is hardly an answer to a body of law which requires a showing of "necessity" before unequal treatment may be meted out. It is hardly necessary to treat newspapers differently when there is nothing to be gained by doing so.

CONCLUSION

While this case arises in the context of the killing of one juvenile by another, it raises no questions and requires no ruling from the Court as to the continued viability of the juvenile court system itself. So far as this case goes, West Virginia may continue to treat its juvenile offenders as it chooses, so long as there is no infringement of the constitutional rights of the juveniles themselves.

There is but one constitutional right at issue in this case. It is the right of the newspapers of this country to print the news that they learn—and to do so free of advance censorship. Given the many prior rulings of this Court, we respectfully submit that the case is not a difficult one. The decision below should be affirmed.

Respectfully submitted,

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Dated: January 29, 1979